Supreme Court, U.S.
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No. 94-1924

In The

Supreme Court of the United States

October Term, 1994

JOHN E. HAYES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONER, JOHN E. HAYES, JR.

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QUESTIONS PRESENTED FOR REVIEW

I.

WHERE AN INDICTMENT IS SEALED FOR ALMOST FIVE YEARS, WHILE THE GOVERNMENT SEEKS TO LOCATE, APPREHEND AND DEPORT TO THE UNITED STATES A FUGITIVE FOREIGN NATIONAL CODEFENDANT, SHOULD A COURT ANALYZING WHETHER, FOR SPEEDY TRIAL PURPOSES, THE DELAY IS CHARGED AGAINST THE GOVERNMENT, EVALUATE ONLY WHETHER THE GOVERNMENT WAS EXERCISING REASONABLE DILIGENCE TO APPREHEND THE CODEFENDANT; OR SHOULD IT DETERMINE WHETHER THE GOVERNMENT'S EFFORTS TO CAPTURE THE CODEFENDANT WERE REASONABLY LIKELY TO RESULT IN A PROMPTLY-HELD TRIAL FOR THE AVAILABLE DEFENDANT, WHO IS UNAWARE OF THE PENDING SEALED CHARGE?

II.

WHERE AN INDICTMENT IS SEALED FOR 58 MONTHS IN A COMPLEX WHITE COLLAR FRAUD PROSECUTION, IN ORDER THAT THE GOVERNMENT CAN UNSUCCESSFULLY TRY TO LOCATE, APPREHEND, AND DEPORT TO THE UNITED STATES A FUGITIVE FOREIGN NATIONAL CODEFENDANT, IS THE AVAILABLE DEFENDANT'S FAILURE TO MOVE TO DISMISS THE INDICTMENT ONCE UNSEALED, AND HIS SUBSEQUENT REQUEST TO HAVE THE CASE DECLARED "COMPLEX" UNDER THE SPEEDY TRIAL

QUESTIONS PRESENTED FOR REVIEW – Continued

ACT, 18 U.S.C. § 3161, *ET SEQ.*, IN ORDER TO PREPARE TO DEFEND AGAINST THE CHARGES, SOME OF WHICH RELATED TO EVENTS 15 YEARS EARLIER, FATAL TO A FINDING THAT HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WAS VIOLATED?

III.

DID THE COURT OF APPEALS ERR UNDER *DOGGETT V. UNITED STATES*, 505 U.S. ___ (1992), BY NOT PRESUMING PREJUDICE TO PETITIONER, FROM THE DELAY RESULTING FROM AN INDICTMENT BEING SEALED FOR 58 MONTHS IN A COMPLEX WHITE COLLAR FRAUD PROSECUTION, INVOLVING SOME ALLEGATIONS THEN UP TO FIFTEEN YEARS OLD, WHERE THE DELAY OCCURRED SO THAT THE GOVERNMENT COULD UNSUCCESSFULLY TRY TO LOCATE, APPREHEND, AND DEPORT TO THE UNITED STATES A FUGITIVE FOREIGN NATIONAL CODEFENDANT, AND DURING THE DELAY, THE MAGISTRATE THEN SUPERVISING THE CASE MADE NO INQUIRY AS TO HOW THE DELAY IMPACTED ON THE RIGHT TO A SPEEDY TRIAL FOR PETITIONER, WHO WAS AVAILABLE FOR TRIAL DURING THE ENTIRE PERIOD?

ARGUMENT

The Government, in its opposition to the petition, attempts to downplay both the length of delay in this case and its significance to a conclusion that Petitioner's Sixth Amendment rights were violated.

Petitioner submits that the Eleventh Circuit's analysis of the Sixth Amendment issues ignored consideration of *Hayes'* right to a speedy trial when it held that the Government had a legitimate reason to delay petitioner's trial by trying to secure co-defendant Fred Thom's arrest. To conclude that the Government in the first instance had a legitimate interest in a joint trial and in securing Thom for trial does not, and should not, end the inquiry. A court sanctioning delay for the apprehension of a fugitive co-defendant must evaluate the available defendant's interest in preparing a defense and resolving the charges against him. Regardless of the Government's "persistence" in securing Thom, a conclusion by the Eleventh Circuit with which petitioner takes issue, the apparent unquestioning acceptance of the status reports by the Magistrate afforded Petitioner no such consideration. This is particularly true where the length of the delay is measured in years, not months. At some point, long passed in this case, the delay became, as a matter of law, "unreasonable."

The cases relied upon by the Government, where delay in bringing the defendant to trial was condoned due to an absent witness or co-defendant, are clearly inapplicable here. First and foremost, in each of those cases, the defendant was aware of the charges against him, and thus could continue to marshal his evidence and

prepare his defense during the intervening period. Second, the greatest period of delay countenanced in those cases was less than one year. *See, United States v. Walker,* 1 F.3d 423, 427 (6th Cir. 1993) (where a material witness was imprisoned in Japan; total delay: 358 days); *United States v. Koller,* 956 F.2d 1408, 1413 (7th Cir. 1992) (where a material witness suffered a heart attack and had bypass surgery; total delay: eight and one-half months); *United States v. Tranakos,* 911 F.2d 1422, 1428 (10th Cir. 1990) (where a defendant's absence *following* arraignment of the other defendants delayed the trial; total delay: eight months).

That the Government may have had a proper motive for initially delaying Petitioner's trial does not dispose of Petitioner's Speedy Trial claim. In *United States v. Hamilton,* 46 F.3d 271, 278-9 (3rd Cir. 1995), the trial court dismissed an indictment for violation of the Speedy Trial Act, 18 U.S.C. § 3161. There, the Government had moved to postpone the trial to allow additional time for three essential witnesses to resolve their own cases, so that they could testify at trial against the defendant. The Third Circuit affirmed, agreeing that the Government had a legitimate goal of trying to obtain the witnesses' testimony, but concluding that they were not thereby "unavailable" under the Speedy Trial Act. Thus, the time of the delay was not excludable under the Speedy Trial Act. The *Hamilton* Court recognized that the Government's decision to grant witnesses use immunity had collateral legal consequences, whether its subsequent inability to use the witnesses' testimony against them, or with respect to calculation of excludable time under the Speedy Trial Act in the target defendant's case.

Similarly, the Government's decision to forestall unsealing Hayes' indictment so that it could attempt to secure Thom's presence, while initially a perfectly legitimate prosecutorial action, was not without ultimate implication to Hayes' Sixth Amendment rights. Like the Government's immunity decision in *Hamilton*, its desire to delay Hayes' trial until apprehending Thom did not immunize the Government from the resulting violation of Hayes' Speedy Trial rights. The Eleventh Circuit itself previously recognized that the legitimate prosecution goal of securing the presence of all defendants for trial could not support endless delay, because, under the Speedy Trial Act, the rights of the available defendants also had to be preserved. *United States v. Khoury*, 901 F.2d 948, 973 (11th Cir. 1990). Well before the government moved to unseal the indictment in this case, it was incumbent upon the supervising Magistrate and the Government to recognize that the delay in securing Thom was unreasonably depriving Hayes of his independent right to have adjudicated the grand jury's charges against him.

Moreover, the Eleventh Circuit did not, contrary to the Government's assertion (Respondent's Brief, at 9), conclude that the Government acted diligently in bringing Hayes to trial. It concluded that its diligence in trying to bring Thom to justice was reasonable. While Petitioner does not agree with that conclusion, it is evident that missing from the Eleventh Circuit's analysis, as was absent in the Magistrate's supposed supervision of the case during the delay, was a consideration of the impact of the delay on Hayes' right to know about and timely

dispose of the charges lodged against him. That Petitioner found it necessary and prudent to seek relief from the time limitations imposed by the Speedy Trial Act, so that he could have some additional time to prepare a defense to charges which, by then, spanned almost 15 years, is unremarkable.

Finally, the Eleventh Circuit's analysis of the *Barker v. Wingo*, 407 U.S. 514 (1972), factors, as applied in *Doggett v. United States*, 505 U.S. ___, 112 S.Ct. 2686, 120 L.Ed.2d 120 (1992), ignored a crucial distinction between *Doggett* and this case. In *Doggett*, this Court was concerned with the government's efforts, or lack thereof, in bringing that single defendant to trial. The government's diligence in such circumstances focuses, necessarily, on just two parties, the Government and the missing defendant. In those cases, the inquiry is, did the Government act diligently, and did the missing defendant contribute to the government's inability to find him? Here, however, there was a third party – the available defendant – to consider, and no amount of diligence by the Government over five years, assuming it was diligent, justified keeping the available defendant "in the dark" about the pending charges for such a long period of time.

Since the length of delay was unreasonable, and the Government's efforts *vis-a-vis* Hayes were tantamount to the extreme negligence that Respondent recognizes under *Doggett* causes prejudice to be presumed, the court below should have presumed prejudice to Petitioner. Moreover, as noted in *Doggett*, the longer the delay, the greater the presumptive prejudice, *id.*, at 2693, particularly since failing to recall what has been forgotten is the most pernicious type of prejudice. Considering that (1) Petitioner

was acquitted of all the more "recent" charges in the indictment and convicted only of those charges which at most occurred between 10 and 15 years prior to the unsealing of the indictment; and (2) he pointed specifically to the inability of Joan Rose, the key "insider" to testify at trial, to recall the purpose of money transfers which the government contended were proceeds of fraud, but the defense contended were unrelated payments, and those transfers constituted the violations of which Petitioner was convicted, prejudice was amply demonstrated.

CONCLUSION

WHEREFORE, Petitioner John E. Hayes, Jr., respectfully requests the Court to grant his petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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